



Comptroller General
of the United States

Washington, D.C. 20548

MR. MORROW

Decision

Matter of: M.D. Oppenheim & Company, P.A.

File: B-241252

Date: January 31, 1991

Stanley J. Moskowitz for the protester.
Nancy Sullivan, Department of Agriculture, for the agency.
William R. Tichenor for Tichenor & Eiche, and John M. Kamy
for Gardiner, Kamy & Co., interested parties.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest that solicitation was deceptive regarding the possibility of multiple contract awards is denied where the solicitation specifically provided for the possibility of multiple awards.
2. Protest that contracting agency will waste \$50,000 in unnecessary travel costs is denied where travel costs were not an evaluation factor for award.
3. Award to a firm that proposed to subcontract 39 percent of the work under the service contract to a large business was consistent with solicitation provisions limiting subcontracting on this small business set-aside.
4. Evaluation, which took into account the experience and personnel of the awardee's significant subcontractor, was proper and consistent with the solicitation's stated evaluation criteria.
5. Agency reasonably found that protester's proposal, which received a consolidated technical and cost score of 91.5 points on a 100-point scale, was not essentially equal to the awardee's proposal, which received a consolidated point score of 92, where the contracting officer found the point difference justified the award in view of the protester's significantly higher (12 percent) evaluated price and the relatively close technical ratings of the protester and awardee.

050491 / 143078

6. Protest that agency failed to provide adequate proposal preparation and evaluation period is untimely under the General Accounting Office's Bid Protest Regulations where protested after award.

DECISION

M.D. Oppenheim & Company, P.A. protests the award of contracts under request for proposals (RFP) No. RFP-OIG-90-R-4, issued by the United States Department of Agriculture (USDA), Office of Inspector General (OIG) Audit Regional Office, for auditing services.

We deny the protest in part and dismiss it in part.

USDA issued the RFP as a small business set-aside on July 30, 1990, to obtain audit services for the USDA-OIG, Hyattsville, Maryland. The contractor was to provide, primarily within the region,^{1/} qualified personnel, materials, and travel to perform audits, surveys, reviews and other tasks needed by the OIG.

According to the RFP, the evaluation of proposals would consist of a technical and cost evaluation, and a consolidation of the technical and cost scores. The offerors' evaluated costs were their fixed hourly rates for four designated labor categories multiplied by the respective estimated hours listed in the RFP for each category for the base year plus 2 option years. The technical score was based on the criteria and point range listed in the RFP: proposed personnel's experience and qualifications, the firm's capability and management structure, understanding of the requirements and participation in external quality control reviews. To consolidate scores, the RFP indicated that the technical score would be weighted by a factor of 75 percent and the cost score by a factor of 25 percent and the sums added in order to determine the overall score for each proposal.^{2/}

^{1/} The region covered the District of Columbia and the states of Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia.

^{2/} The highest technical score and lowest evaluated cost of the acceptable proposals were converted to 100 points and the other technical scores and higher evaluated costs weighted based on their ratio to the top rated proposals. The technical scores were then multiplied by 75 percent and cost scores by 25 percent and the sums added.

The RFP also stated that:

"If proposals are considered to be essentially equal as a result of the consolidation of scores, award will be made to the responsive, responsible offeror whose proposal received the highest technical score of those with equal overall scores."

Award was to be made to the responsive, responsible offeror whose proposal was determined to be the most advantageous to the government, cost and other factors considered. Additionally, the RFP indicated that while only one contract award was anticipated, the government reserved the right to make multiple awards, if advantageous and practicable.

On August 30, USDA received 16 proposals in response to the RFP. The first ranked offeror, Tichenor and Eiche, with a proposed price of \$621,000, received a consolidated score of 92.75, based upon consolidation of a technical score of 84 (weighted as 100 points)^{3/} and a price score of 66. The second ranked offeror was Gardiner, Kamy & Co., which had proposed a price of \$593,650, and received an overall score of 92, based upon a consolidation of a technical score of 82 (weighted as 98 points) and a price score of 74. Oppenheim was the third ranked offeror with a proposal price of \$666,915 and an overall score of 91.50, based upon consolidation of a technical score of 84 (weighted as 100 points) and a price score of 66. After evaluating proposals, USDA, on September 20, made awards to the first and second ranked offerors, without discussions, on the basis of initial proposals. This protest to our Office followed on September 21.

Oppenheim has made six separate challenges to the awards. Our review of the allegations provides no basis to challenge the awards.

First, Oppenheim asserts that the RFP was deceptive in indicating that only a single contract award would be made. As noted above, the RFP expressly provided that multiple awards could be made. USDA reports that the number of awards resulted from the funds which became available at the time of award and the determination that two awards would be necessary to complete the audits within the required timeframes. While Oppenheim alleges that USDA's multiple awards had a detrimental effect upon New York area firms and was to the advantage of Washington D.C. area firms--which in fact

^{3/} 84 was the highest of the technical scores.

received two awards--our review of the evaluation, and Oppenheim's speculative comments, does not provide any support for this allegation. The awards were made to Washington, D.C. area firms because they received the highest overall scores.4/

Next, Oppenheim argues that USDA intends to waste up to \$50,000 in unnecessary travel costs because a New York area firm, like Oppenheim, was not selected to do the work in that region. However, travel costs were not a stated evaluation factor.5/ Also, it is apparent that travel costs would be incurred by any firm, including Oppenheim, regardless of location in performing the contract work, which was not broken down by geographical region. Indeed, as indicated above, there was no provision in the RFP for splitting the awards along geographic regions. Finally, Oppenheim's price was higher than that of the awardees. Therefore, this protest basis has no merit.

Oppenheim next argues that award to Gardiner may be subverting the intent of the Small Business Act because Gardiner intends to subcontract up to 50 percent of the work to a big eight accounting firm. Oppenheim contends that such action is inconsistent with the RFP provision limiting competition to small business firms. See Federal Acquisition Regulation (FAR) § 52.219-14. In response, USDA reports that Gardiner proposed to perform work constituting 61 percent of the contract dollar volume, and the subcontractor would perform work constituting 39 percent of the contract dollars. USDA further reports that it examined a copy of Gardiner's proposal and executed subcontract agreement, and determined that this constituted a true subcontracting arrangement and that the firm would comply with the solicitation's subcontracting limitations. Our review of the record confirms that USDA reasonably determined that Gardiner's subcontracting arrangement complied with the terms of the RFP for small business concerns. See Science Sys. and Applications, B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.

4/ To the extent Oppenheim asserts that awards should have been made on a regional basis with one award going to a New York area firm, this protest basis is untimely under our Bid Protest Regulations since it concerns an alleged solicitation impropriety, which was not filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1990).

5/ To the extent Oppenheim argues travel costs should have been an evaluation factor, this contention concerns an alleged solicitation deficiency and was also untimely filed after award. 4 C.F.R. § 21.2(a)(1).

Oppenheim next contends that the technical evaluation of Gardiner's proposal may have been flawed, assuming Gardiner's subcontracting arrangement was improper, because of points improperly awarded to it for the personnel and experience of its subcontractor. As noted above, the RFP did not preclude the particular subcontracting arrangement proposed by Gardiner. Therefore, USDA could reasonably evaluate the personnel and experience of Gardiner's proposed subcontractor. Id.

Oppenheim also argues that the award to Gardiner was not made in accordance with the RFP's award criteria.^{6/} Specifically, Oppenheim notes the RFP states that where proposals are considered to be essentially equal after the consolidation of technical and cost scores, the offeror, which received the higher technical score, should be selected for award. Oppenheim contends that its proposal, rated at 91.5 points, must be considered "essentially equal" to Gardiner's proposal, which was rated at 92 points, and that it is therefore entitled to the award, since its technical score of 84 points is higher than Gardiner's 82 score.

In making a source selection, closeness of point scores does not necessarily indicate that the proposals are essentially equal. See Training and Mgmt. Resources, Inc., B-220965, Mar. 12, 1986, 86-1 CPD ¶ 244; Moorman's Travel Serv., Inc.--Recon., B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643 (proposals were not considered equal despite the fact that they only differed by .5 points on a 100-point scale). Point scores should be used as a guideline to intelligent decision-making by source selection officials and award decisions should not be based upon the difference in scores alone; rather, a selection should reflect the procuring agency's considered judgment of the significance of the difference in point scores. Id.

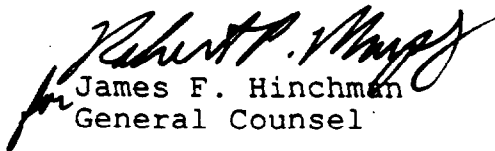
In this case, the contracting officer did not find Oppenheim's proposal to be essentially equal to the awardees' proposals, despite the closeness in point scores. Indeed, the contracting officer, in reporting on the source selection, expressly noted Oppenheim's higher evaluated price (\$666,915), which is significantly higher (12 percent) than Gardiner's price (\$593,650). The contracting officer also notes that Gardiner's and Oppenheim's technical proposals were both rated highly technically acceptable and one firm was not judged more qualified than the other firm, as indicated by the relatively

^{6/} This argument was based upon USDA's disclosure of the scoring in the report on the protest. Oppenheim then timely protested this matter with 10 working days of receipt of the report.

close point scores. The record also indicates that the cost scores were significantly compressed because the low priced acceptable, albeit significantly lower technically rated, offeror had a much lower price (\$441,500) than any other proposed. Under the circumstances, the contracting officer found that the awardees' point scores and the Oppenheim score were essentially equal and justified the awards. Therefore, we find the award was in accordance with the RFP award criteria.

Oppenheim finally argues that the USDA, by virtue of their inability to issue the RFP in a timely manner, eliminated the opportunity for best and final offers and the opportunity to receive more favorable offers. Oppenheim advises that previous procurements were issued well in advance of the contract due date, whereas this procurement only provided 2 months for proposal preparation, evaluation and award. We find this issue to be untimely. As noted above, alleged improprieties in a solicitation, which are apparent before the closing date for receipt of initial proposal, such as the issue protested here, must be filed prior to the closing date, not after the award. See 4 C.F.R. § 21.2(a)(1).

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel